

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES RAY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

June 6, 1997

No. 191778

Detroit Recorder's Court

LC No. 94-010990

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; 28.424(2), but was convicted by a jury of voluntary manslaughter, MCL 750.321(A); MSA 28.553, and felony-firearm. Defendant was sentenced to ten to fifteen years' imprisonment for the manslaughter conviction, which is to be served consecutively to the mandatory sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to find him guilty of voluntary manslaughter because the prosecutor failed to disprove self-defense beyond a reasonable doubt. We disagree. Voluntary manslaughter is defined as an intentional killing which is committed under the influence of passion produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believed that his life was in imminent danger or that there was a threat of serious bodily harm. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993). Where a defendant introduces evidence of self-defense, the prosecution bears the burden of disproving it beyond a reasonable doubt. *Id.* at 20.

In the instant case, testimony conflicted as to whether the victim had a gun. The jury is to resolve such conflicts. *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996). When we view the evidence in a light most favorable to the prosecutor, *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996), we find that the jury could have believed three witnesses' testimony that the victim did not have a gun or make any threatening gestures toward defendant. Moreover, the

jury could have believed that defendant had the intent to kill the victim and was acting in the heat of passion because the victim insulted defendant's children. While mere words do not generally suffice in establishing adequate provocation, the question is for the fact finder. *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346, reh den 437 Mich 1284; 474 NW2d 291 (1991). We therefore conclude that there was sufficient evidence to convict defendant of voluntary manslaughter.

Defendant next argues that the trial court erred in denying his request for a jury instruction on the offense of careless, reckless, or negligent use of a firearm, MCL 752.861; MSA 28.436(21). A trial court is obligated to instruct on a cognate lesser included offense only if there is evidence which would support a conviction on that offense. *Pouncey, supra* at 387; *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996). The offense of careless, reckless or negligent use of a firearm is a cognate lesser offense of second-degree murder, *People v Rochowiak*, 416 Mich 235, 242; 330 NW2d 669 (1982).

Here, the jury was instructed on first-degree murder, second-degree murder, and voluntary manslaughter. Therefore, the trial court was obligated to instruct on careless, reckless or negligent use of a firearm if the evidence supported such a finding. There must be more than a modicum of evidence in order to warrant an instruction. *Pouncey, supra*; *Cheeks, supra*. Under Michigan law:

Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor. [MCL 752.861; MSA 28.436(21).]

Where a defendant consciously makes a decision to aim his gun and pull the trigger in order to strike the victim, the defendant is not entitled to an instruction on careless, reckless, or negligent use of a firearm. *People v Dabish*, 181 Mich App 469; 450 NW2d 44 (1990). In the instant case, the evidence established that defendant willfully, consciously, and knowingly fired his gun at the victim. Therefore, we find no error in the trial court's denial of defendant's request for the instruction because there was no evidence to substantiate a finding of careless, reckless, or negligent use of a firearm.

Next, defendant challenges the trial court's interpretation and scoring of OV 3 and OV 6. After *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997), we no longer recognize challenges grounded on the misapplication of guideline variables. Accordingly, we review defendant's prison sentence of ten to fifteen years for the voluntary manslaughter conviction solely to determine whether it is proportionate to the circumstances surrounding the offense and the offender. *Id.* at 177; *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Defendant shot his victim three times, once in the back, for allegedly insulting his children. In light of the seriousness of the offense, the utter lack of justification for the shooting, and defendant's complete disregard for human life, we find his sentence to be proportionate.

Affirmed. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gibbs